Calendar No. 1005

101st Congress *2d Session*	SENATE	REPORT 101-543

ADMINISTRATIVE DISPUTE RESOLUTION ACT

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 971

TO AUTHORIZE AND ENCOURAGE FEDERAL AGENCIES TO USE MEDIATION, CONCILIATION, ARBITRATION, AND OTHER TECHNIQUES FOR THE PROMPT AND INFORMAL RESOLUTION OF DISPUTES, AND FOR OTHER PURPOSES

OCTOBER 19 (legislative day, OCTOBER 2), 1990.—Ordered to be printed

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Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 971]

The Committee on Governmental Affairs, to which was referred the bill (S. 971) to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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I. PURPOSE

Alternative dispute resolution (ADR) procedures are informal, consensual procedures which can be used by parties in a dispute to obtain a resolution in lieu of formal litigation. These procedures include settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials and arbitration or any combination of these. Often, the use of ADR procedures can result in more effective, fair, timely and less costly dispute resolution.

Agencies are currently able to, and several do, take advantage of ADR methods without express authorization by statute or regula-

tion. The purpose of S. 971 is to place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation. The goal of the bill is to send a clean message to agencies and private parties that the use of ADR to resolve disputes involving the federal government is an accepted practice and to provide support for agency efforts to develop and/or enhance individual ADR programs.

S. 971 encourages agencies to consider potential ADR uses and requires them to develop a specific policy to implement such uses. The bill calls for each agency to appoint a dispute resolution specialist and to establish an appropriate personnel training program in the use of negotiation and other dispute resolution methods. It provides a new Subchapter within Title 5 of the United States Code on use of ADR techniques and resolves issues related to such matters as confidentiality and use of neutrals. Specific provisions on arbitration are included to resolve questions and constitutional concerns about the use of this technique to resolve disputes involving the United States.

Participation in the ADR techniques authorized by the Act is predicated on the voluntary, informed agreement of all parties to a dispute. These techniques are intended to supplement—not replace or limit—existing dispute resolution practices and procedures.

II. Background

The number of lawsuits filed in the United States is enormous. The number of civil cases alone is substantial. According to the Administrative Office of the U.S. Courts, in the year ending December 31, 1989, the total number of civil cases commenced in the United States was over 220,000. The Federal government was a party in over 55,000 of these cases, and there were over 100,000 private civil cases involving a federal question.

In response to this situation, the private sector has increasingly turned to alternative methods to litigation such as those promoted by S. 971. An increasing number of lawyers are being trained in ADR methods. According to an article entitled, "Congress, The Executive Branch, and The Dispute Resolution Process", written by Senator Charles Grassley and Charles Pou, Jr. of the Administrative Conference of the United States, over half the law schools in the nation now offer courses in dispute resolution. Also, there are over 360 non-profit community resolution programs in operation. Moreover, states have also recognized ADR methods as valuable tools. According to this article, over 20 state legislatures have enacted laws establishing statewide mediation centers or other dispute resolution procedures, and there are as many as 275 operational court-related ADR programs of various types in over 40 states.

In recent years, interested individuals have argued that federal agencies should take greater advantage of ADR methods to allow them enhanced flexibility in resolving disputes. Federal agencies are currently authorized to engage in many ADR techniques such as mediation, conciliation, and minitrials. In fact, agencies such as the Environmental Protection Agency (EPA), the Army Corps of

Engineers, the Merit System Protection Board, and the Department of Justice have individual programs which utilize ADR methods. However, up to now, there has been no government-wide emphasis on the use of ADR techniques and, therefore, there is little knowledge on the part of many agencies as to what ADR methods exist and what the accepted procedures are for their use.

The Administrative Conference of the United States (ACUS), with its responsibility to promote the efficiency, adequacy and fairness of federal administrative procedures, has performed a great deal of work in the last several years regarding federal agency use of ADR techniques.

In the early 1980's ACUS formally recommended that agencies consider using negotiation in formulating rules—a procedure now known as negotiated rulemaking. Negotiated rulemaking is a process by which an agency invites the parties that will be affected by a rule to join the agency in forming an ad hoc committee to develop a consensus draft of the rule. If consensus on the draft rule is reached, that draft become the base document for the proposed rule which is then published for public comment. ACUS Recommendation 82-4 Procedures for Negotiating Proposed Regulations (1 CFR 305.82-4) encouraged and provided guidance to agencies on the use of this technique.

The goal was to arrive at more effective, timely, and fair rulemaking through these informal, voluntary proceedings. By including affected parties in the rulemaking process at an early stage and in a nonadversarial setting, the resulting rule has proven itself to have a better chance of acceptance and, most importantly, of being a more sound, realistic and effective rule. Agencies such as the Federal Aviation Administration and the Environmental Protection Agency have used—and continue to use—this technique in the development of their rules. Due to the positive experience of these and other agencies, legislation has now passed both Houses of Congress to establish a statutory framework for conducting negotiated rulemaking in order to encourage federal agencies to use the procedure when it enhances conventional rulemaking.

While negotiated rulemaking was proving itself to be a successful alternative means of rulemaking, relying on informality and nonadversarial relationships, ACUS began to explore the broader topic of ADR techniques, which take a similar informal and nonadversarial approach to resolving disputes.

In 1986, the ACUS issued Recommendation 86-3 on Agencies' Use of Alternative Means of Dispute Resolution (1 CFR 305.86-3). This recommendation, like the earlier one regarding negotiated rulemaking, encouraged agency use of ADR methods and provided guidance on how and when to use them. Once again, the goal was to promote more efficient, effective administrative procedures through the use of voluntary, informal procedures.

Recommendation 86-3 urges agencies to make use of ADR techniques, within their existing statutory authority, to settle disputes. Although ACUS believes federal agencies already possess the authority to use most ADR procedures, it discovered that agencies often avoid ADR techniques due to confusion over agency authority to use them and the acceptability of such techniques within the Executive Branch. As a result, ACUS recommended legislation to

clarify and expand agency authority with regard to the appropriate use of ADR methods to resolve disputes involving the federal government.

During the 100th Congress, legislation was introduced by Senator Charles Grassley and Representative Donald Pease to accomplish that goal. The two bills, S. 2274 in the Senate and H.R. 5101 in the House of Representatives, were modeled after the 1986 ACUS recommendation. Hearings were held on the bills in the Senate Subcommittee on Courts and Administrative Practice and the House Subcommittee on Administrative Law and Governmental Relations. No further action was taken subsequent to those hearings.

Senator Grassley reintroduced his bill in the 101st Congress on May 11, 1989. That bill, S. 971, was referred to the Senate Committee on Governmental Affairs and, subsequently, to the Subcommittee on Oversight of Government Management.

Hearings were held on S. 971 in the Oversight Subcommittee on September 19, 1989. The hearing focused on the appropriateness of utilizing ADR techniques with regard to various federal disputes and the ability of the framework created by S. 971 to accomplish the effective and responsible use of ADR in the federal government.

Additional issues that were addressed at the hearing included: (1) Constitutional concerns regarding the expansion of the use of arbitration by federal agencies; and (2) the qualification and training of neutrals to be used in ADR proceedings.

The witnesses at the September 19 hearing were: Senator Grassley; an agency panel consisting of the Environmental Protection Agency, the Department of Justice, and the Merit Systems Protection Board (MSPB); and a panel of private sector individuals experienced in the use of ADR techniques consisting of the Director of Environmental Dispute Resolution for the Conservation Foundation, a senior partner with Crowell and Mooring, a Washington D.C. law firm, and a representative of the American Bar Association.

Each of the agencies that testified had some experience using some form of ADR. For example, as a result of the enactment of the Civil Service Reform Act of 1978, the MSPB is allowed to arbitrate cases and also has a Voluntary Expedited Appeals Procedure (VEAP) which makes use of various forms of ADR. EPA has recently initiated an ADR program and is authorized by statute to arbitrate specific cases arising under Superfund. EPA expressed interest at the hearing in expanding its ADR program, and it is an agency that could greatly benefit from such an expansion. The Deprartment of Justice has utilized and experimented with various ADR techniques, such as minitrials, within its own agency.

The representative from the Conservation Foundation, Ms. Gail Bingham, and the representative from Crowell and Mooring, Mr. Eldon Crowell, were both in favor of expanding the use of ADR in the federal government, and both were familiar with its use in the private sector. Ms. Bingham is a practicing mediator, and Mr. Crowell is an expert in contract law and the use of ADR methods in this area.

EPA and the MSPB both testified in support of S. 971. The MSPB testified that in their five-year history of using ADR meth-

ods, "the ADR techniques used by the board have resulted in faster, less expensive case processing." The MSPB went on to state that in 1988, cases using ADR were disposed to in 65 days, and cases which progressed through the usual Board procedure took 99 days.

In August 1987, EPA Administrator Lee M. Thomas wrote in a memo to Assistant Administrators and Regional Administrators of the EPA the "* * * ADR holds the promise of lowering the transaction costs to both the agency and the regulated community of resolving applicable disputes." He closed the cover memorandum by stating, "I challenge each of you to help in our efforts to apply ADR to the enforcement process * * * I ask the Regional Administrators to review the enforcement actions now under development and those cases which have already been filed to find cases which could be resolved by ADR." Both agencies stressed the need for flexibility in ADR programs and the importance of sending a clear signal to agencies regarding the use of ADR as an accepted alternative to formal litigation.

The Department of Justice, as mentioned before, has also experimented with the use of ADR and is supportive of its expansion in the federal government. However, the Justice Department objected to the inclusion of binding arbitration in the methods available to agencies to resolve disputes. The Justice Department argued that the use of binding arbitration by agencies which do not already have specific statutory authorization to do so raises serious constitutional concerns.

The Department listed these constitutional concerns:

(1) that the appointment of individuals to be arbitrators may interfere with the Article II Appointments Clause, since arbitrators will oftentimes not be federal employees;

(2) that a separation-of-powers question would arise due to the fact that Congress, under S. 971, would be authorizing private parties to perform agency decision-making powers;

(3) that judicial responsibility and authority would be removed from constitutionally established Article III Courts; and

(4) that arbitration may interfere with due process.

The Department also described two statutory barriers to the use of arbitration by federal agencies:

(1) 31 U.S.C. Sec. 1346 prohibits the use of federal funds to pay, "the pay or expenses of a commission, council, board, or similar group, or a member of that group, or expenses related to the work or results of work or action of that group" unless authorized by law.

(2) 31 U.S.C. Sec. 3702 provides that "the Comptroller General shall settle all claims of or against the United States Government."

The General Accounting Office has traditionally interpreted these two statutes to prohibit the use of arbitration by federal agencies unless such use is specifically authorized by Congress such as under the Federal Arbitration Act or the Civil Service Reform Act or in other very specific instances.

Supporters of agency use of ADR argue that these prohibitions have been too expansively interpreted and that S. 971's explicit authorization would solve any existing problem.

Supporter of S. 971 also argue that the specific provisions of the bill guard against any constitutional problems, because the decision to arbitrate is voluntary on the part of all parties and is subject to the guidelines in section 582 of the bill which outline instances in which an alternative dispute proceeding would be inappropriate. Individuals who so not believe binding arbitration by federal agencies, absent specific statutory authority, violates the Constitution often point to an article by Harold Bruff, a noted constitutional scholar and University of Texas law professor, defending the constitutionality of arbitration in federal programs. This article entitled, "Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs," from the 1989 Texas Law Review is included in the Senate Subcommittee's September 19, 1989, hearing record (S.Hrg. 101-494). The article traces the case history of arbitration programs within the federal government and defends the use of arbitration in federal programs as long as certain specific protections are taken against the misuse of this authority. Supporters of S. 971 point to the inclusion of many of these protections in S. 971 such as those mentioned above.

In order to further clarify this issue, the Subcommittee on Oversight requested that the American Law Division of CRS identify any constitutional problems with S. 971. The CRS brief, dated August 17, 1989, and included in the September 19, 1989, hearing report, concludes that S. 971 could meet a constitutional challenge:

> It appears that S. 971 could withstand constitutional challenge under Article II, Article III, and the Due Process Clause. Under Article II, it does not appear that arbitrators would have to be appointed by the President, or that the use of private parties as arbitrators would be an impermissible delegation of governmental power. Under Article III, arbitrators would not have to be judges with life tenure subject to good behavior. Finally, under the Due Process Clause, S. 971's providing for unbiased arbitrators and for limited judicial review would appear adequate.

Despite this analysis, the constitutionality of binding arbitration remains an issue over which there is much debate. During the course of the hearing, the Department of Justice stated that true binding arbitration is not in use in the federal government except, perhaps, in the Federal Labor Relations Authority. The Justice witness argued that the arbitration currently authorized by statute for federal agencies is reviewable by the agency head before the resultant award becomes final and, therefore, is not truly "binding" arbitration. The arbitration procedure currently used by the EPA to resolve cases in the Superfund Program includes a provision which calls for public review and comment of arbitral decisions before such decisions become final.

Similar concerns had been raised by the Justice Department during hearings held on the House counterpart to S. 971, H.R. 2497 introduced by Congressman Glickman. In the weeks following the September 19, 1989 hearing, the Justice Department worked with other interested parties to develop a procedure which would put to rest these constitutional concerns. A provision was agreed upon, and H.R. 2497 was amended to provide that an arbitral award

would be reviewable and reversible by the agency head for a period of 30 days before becoming final. This solution ensures that an officer of the United States is ultimately responsible for the decision reached as the result of an arbitration proceeding, not an outside party. The arbitration proceeding is, in effect, "non-binding" for a period of 30 days. This same provision has been included in S. 971, as amended, and thus addresses any remaining constitutional concerns with regard to the Act.

On September 25, 1990, the Senate Subcommittee on Oversight of Government Management reported S. 971 to the full Committee on Governmental Affairs, with an amendment in the nature of a substitute. On October —, 1990, the Committee voted unanimously in favor of the substitute and several technical amendments and ordered the bill as amended reported to the full Senate for passage.

III. Summary

S. 971 amends the Administrative Procedure Act to authorize parties involved in disputes arising under federal administrative programs to agree to use ADR methods. The use of such methods is subject to certain specific guidelines regarding cases which may be inappropriate for resolution through ADR methods. Voluntary, binding arbitration is authorized when all parties consent, subject to safeguards of judicial review and agency review of the appropriateness of arbitral awards. The bill establishes standards of confidentiality in ADR proceedings, facilitates agency use of ADR techniques, and lays out judicial review procedures.

The bill makes certain necessary modifications to the Federal Acquisition Regulation, Contract Disputes Act and Federal Tort Claims Act to facilitate the use of ADR in these areas.

S. 971 draws on the experience and expertise of the Administrative Conference (ACUS) and the Federal Mediation and Conciliation Service (FMCS) to further aid agency use of ARD. Agencies are instructed to seek guidance from these two entities. ACUS is required to support, assist, and monitor agency use of ADR. ACUS is also charged with reporting to Congress periodically on agency implementation of the law and with establishing a roster (with the assistance of FMCS) of qualified neutrals for optional use by parties in a dispute. This bill increases the scope of duties for the FMCS to include mediation, training, and other ADR assistance.

IV. Section-by-Section Analysis

The Committee on Governmental Affairs reported S. 971 with a single amendment in the nature of a substitute. This section-by-section analysis is based upon the substitute.

Section 1. Short title

The section states the title of the bill as the "Administrative Dispute Resolution Act".

Section 2. Findings

Section 2 contains the findings on administrative dispute resolution (ADR) techniques. It states that the Administrative Procedure Act was intended to offer prompt resolution of disputes as an alter-

native to litigation, but that administrative proceedings have become formal and lengthy.

The section finds that ADR techniques can provide decisions which are faster, less expensive and less contentious as well as outcomes which are more creative, efficient and sensible. It encourages agency use of ADR, and states that explicit authorization of agency use of ADR techniques will eliminate any ambiguity about an agency's power to engage in such procedures.

Section 3. Promotion of Alternative Means of Dispute Resolution

To encourage agency use of ADR, Section 3 requires federal agencies to adopt policies on the use of ADR techniques, to designate a senior official as the dispute resolution specialist for the agency, and to provide training for this specialist.

The section also requires agencies to review any standard language for the agency's contracts, grants or other agreements to determine whether to include provisions on the use of ADR. The section also requires to amendment of the Federal Acquisition Regulation to provide standard contract language on the use of ADR techniques to resolve disputes and to carry out other provisions in this Act affecting federal contracts, grants and other agreements.

Section 4. Administrative procedures

Section 4 amends Title 5 of the United States Code, in the chapter on administrative procedures, to include a new subchapter on the use of ADR techniques.

The new subchapter would be entitled, "Alternative Means of Dispute Resolution in the Administrative Process." Its provisions are described in the following section numbers as they would appear in Title 5, Chapter 5.

"Section 581. Definitions"

A new Section 581 lists the following definitions that would apply to the subchapter:

"Agency" has the same meaning as in Section 551(1) of Title 5.

"Administrative program" is a federal function which involves the protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemakings, formal or informal adjudications, licensing procedures, or investigations.

"Alternative means of dispute resolution" means any procedure used in lieu of a formal, adjudicative agency proceeding to resolve a controversy. Such alternative means typically make use of a neutral to facilitate dispute resolution between an agency and other parties, and include such techniques as negotiation, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration.

"Award" means the written decision issued by an arbitrator to resolve a dispute.

"Dispute resolution communication" means any oral communication during a dispute resolution proceeding—whether by a party, neutral or nonparty participant—which was made in confidence.

"Dispute resolution document" means any written material which was prepared or provided in confidence during a dispute resolution proceeding by a party, neutral or nonparty participant.

The definition specifically excludes "agreements" to enter into arbitration and documents setting forth arbitration "awards," because such documents describe the status of disputes involving the federal government, should be made available to the public in the vast majority of cases, and do not create reasonable expectations of confidentiality since they involve United States policy and actions. Such agreements and awards can be considered "dispute resolution documents" only when the government and other parties to the dispute explicitly agree in writing to this status, and the law otherwise permits such documents to be kept out of the public domain.

"Dispute resolution proceeding" means any proceeding in which ADR is being used to resolve a dispute between the federal government and specific parties.

"In condidence" means, with respect to information, dispute resolution communications and dispute resolution documents, that the information, communication or document was provided with an explicit request by the source for nondisclosure or under circumstances which created a reasonable expectation in the source that disclosure outside the ADR proceeding would not take place.

"Issue in controversy" means an issue which is material to a decision in an administrative program and with which there is a disagreement between the agency responsible for making that decision and a party or parties who would be substantially affected by that decision.

"Neutral" means an individual who functions to aid federal agencies and other parties to resolve an issue in controversy using ADR techniques.

"Party" has the same meaning as in Section 551(3) of Title 5 or, for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in that proceeding.

"Person" has the same meaning as in Section 551(2) of Title 5.

"Roster" means a list of persons qualified to provide services as neutrals.

"Section 582. General authority"

A new Section 582 provides an explicit statutory authorization allowing federal agencies to use ADR techniques to resolve a dispute regarding the agency's administrative programs when all the parties to the dispute voluntarily agree to its use.

The section also provides guidelines on when ADR techniques should not be used. The section lists six factors which, if one or more is present, make use of ADR techniques inappropriate. If one or more of these factors is present, an agency can still use ADR, but only if it has first carefully analyzed the situation and made a specific decision that the ADR proceeding can be structured to avoid the identified problem or because other concerns significantly outweigh the factors that normally make ADR inappropriate.

The six factors present a number of considerations. For example, they require an agency to consider the importance of using the dis-

pute to establish an authoritative precedent or resolve significant policy questions. Dispute resolutions reached through ADR procedures normally cannot fulfill such functions, since they may utilize a nongovernmental decision-maker, will bypass normal levels of agency review and consultation, may not include consideration of similar disputes or related policy questions, and may be subject to confidentiality requirements.

Another factor is the importance of the agency's maintaining an established policy and minimizing variations among individual decisions in a particular subject area. ADR techniques have few mechanisms to achieve such objectives. Special care must also be taken by the agency to weigh the effect of a dispute resolution on persons and organizations not party to the proceeding and to consider the agency's ability to provide a public record of the proceeding if necessary. ADR techniques vary in the extent to which they can take into account such concerns. Finally, the agency must consider the need for it to maintain continuing jurisdiction over a matter and alter the disposition of a dispute if circumstances change, and whether use of ADR techniques would interfere with such agency obligations. Where such continuing obligations exist, ADR may be an inappropriate means of dispute resolution.

These factors play an especially important role in decisions on the use of arbitration, due to the more formal and binding nature of arbitration procedures. As established in Section 5 of S. 971, they are also part of a new legal standard for judicial review of arbitral awards by persons who were not parties to the arbitration but were adversely affected by the award and want to overturn or modify it.

In addition to encouraging use of ADR techniques, this section contains a provision to make clear that the intent of the Act is to promote ADR methods as a supplement to already existing agency dispute resolution procedures. The provisions of the Act are not meant to interfere with or limit any procedures or practices already in use. The Tennessee Valley Authority (TVA) contacted the Subcommittee to express their concern that certain provisions of the Act, particularly those concerning arbitration, would limit TVA's existing authority to arbitrate. This language in the Act is intended to allay that concern.

"Section 583. Neutrals"

A new Section 583 of Title 5 establishes guidelines for the selection and use of neutrals in ADR proceedings.

The section permits neutrals to be full or part-time officers or employees of any federal agency, or any other individual, upon which the parties agree. It establishes that neutrals other than arbitrators serve at the will of the parties. It states that a neutral is not allowed to have a conflict of interest relating to the issues in the ADR proceeding, unless there is written disclosure of the conflict to all parties in the proceeding and the parties, upon receipt of such disclosure, agree the neutral may serve.

The section outlines the responsibilities of ACUS with regard to agency use of neutrals. It requires ACUS, after consulting with FMCS and other agencies and organizations, to publish recommended professional standards for neutrals, to maintain a roster of

individuals who meet these standards and are qualified to serve as neutrals in agency ADR proceedings, and to make this roster available to agencies considering use of ADR techniques. Because ACUS is to assist but not control agency use of ADR techniques, agencies are encouraged but not required to select neutrals who meet the ACUS standards and are included in the ACUS roster.

The section also authorizes ACUS to enter into contracts with neutrals who may be used by agencies on an elective basis. It also directs ACUS to develop other procedures which will allow agencies to obtain the services of a neutral on an expedited basis.

On the issue of compensation, the section requires all parties to an ADR proceeding, including the federal government, to reach agreement on payment for the neutral's services. This provision replaces language in the House bill which would have required the federal government alone to pay this cost. Allocating this expense solely to the government would be not only an unfair burden on taxpayers, but also an unwholesome influence over neutrals who would have a single source for their paychecks. A better and more common practice is to have the government and all other parties to the dispute pay an equal share of the neutral's services.

The section explicitly authorizes agencies to enter into contracts and interagency agreements to obtain the services of a neutral. It authorizes them to design contracts and interagency agreements which will implement the agreed-to compensation scheme. It also explicitly authorizes agencies to enter into contracts and interagency agreements to obtain training in ADR techniques.

The section requires the government and other parties to the dispute to agree on a rate of compensation for the neutral that "is fair and reasonable to the Government." This language is intended to prohibit excessive fees, but also to make it clear that an agency is not necessarily required to demand that the group select the lowest bid of those seeking to serve as the neutral in the ADR proceeding.

"Section 584. Confidentiality"

A new Section 584 of Title 5 establishes rules to protect the confidentiality of ADR proceedings.

These protections are created to enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. Thus, documents produced during an ADR proceeding, such as a proposal to resolve the dispute, are immune to discovery unless certain specific conditions are met. At the same time, these confidentiality provisions are not intended to frustrate normal discovery in legal proceedings. Thus, the section provides that ADR documents which are otherwise discoverable, such as those which existed prior to the ADR proceeding, remain subject to discovery. In this way, the section attempts to balance the need for confidentiality in ADR proceedings with the right to discovery in other legal settings.

The section treats neutrals and parties separately. It protects communications and documents in the possession of neutrals from discovery or voluntary disclosure unless: the parties consent in writing; the communication or document is already in the public

domain; disclosure is required by statute; or a court, using a balancing test which weighs the need for confidentiality in ADR proceedings, determines disclosure is necessary to prevent injustice, reveal a violation of law, or prevent harm to the public health or safety.

The section protects communications and documents in the possession of the parties to ADR proceedings unless: they agree to disclosure in writing; the communication or document is already in the public domain; disclosure is required by statute; a court, using a balance test which weighs the need for confidentiality in ADR proceedings, determines disclosure is necessary to prevent injustice, reveal a violation of law, or prevent harm to the public health or safety; or the communication or document is needed to establish, clarify, or enforce an agreement or award resulting from the ADR proceeding.

The section imposes a sanction for violating the Act's confidentiality requirements by disallowing the subsequent use in a related legal proceeding of the communication or document that was improperly disclosed.

The section allows the parties to agree to alternative confidentiality procedures if the neutral is informed of the agreement prior to the commencement of the ADR proceeding. If the parties reach agreement after the ADR proceeding has begun, their agreement can bind only themselves. Disclosure requests to the neutral will have to comply with the other provisions in the Act.

The section provides that, in the event a demand for disclosure, pursuant to legal process, is made upon a neutral, the neutral must make reasonable efforts to notify all parties and any affected non-party participant. Any such person who receives such notice must, within 15 calendar days of receiving it, either defend the right of the neutral to refuse disclosure or waive any right to prevent the neutral from complying with the disclosure request.

The section explicitly preserves the discovery and admissibility of any information, communication or document which is otherwise discoverable under federal or other rules of evidence.

The section provides that the confidentiality procedures do not preclude the use of documents or communications from an ADR proceeding to prove the existence of an agreement, award or order issued to pursuant to an ADR proceeding or to resolve an internal dispute between the neutral and the parties. The confidentiality procedures also do not preclude the gathering of non-specific data from ADR proceedings for research or educational purposes.

"Section 585. Authorization of Arbitration"

The rest of the new sections within Title 5, from Section 585 to 591, focus on arbitration. These sections are intended to be read in tandem with The Arbitration Act, which is codified in Title 9 of the United States Code and which provides the statutory framework for binding arbitration in the private sector and, in many respects, in ongoing federal arbitration programs.

A new Section 585 authorizes the use of arbitration whenever all parties consent in writing. It prohibits a federal agency from requiring any person to consent to arbitration as a condition of re-

ceiving a contract or benefit. This prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides.

"Section 586. Enforcement of Arbitration Agreements"

A new Section 586 provides that an agreement to arbitrate a matter is enforceable against the United States under Title 9, Section 4 of the United States Code (the Arbitration Act). The purpose of this provision is to coordinate and clarify the relationship between the subchapter and the existing Arbitration Act, and to stress that existing law applies to the enforcement of arbitration agreements reached pursuant to the subchapter.

"Section 587. Arbitrators"

A new Section 587 provides that the parties to an arbitration—which includes the United States and all other parties—are entitled to participate in the selection of the arbitrator. The particular procedure to be used is left to the discretion of the agencies and parties involved. The section requires the arbitrator to be a neutral who meets the requirements of Section 583.

"Section 588. Authority of the Arbitrator"

A new Section 588 enumerates the powers of arbitrators selected under the subchapter. It authorizes them to conduct hearings, administer oaths, and issue subpoenas for witnesses and evidence in order to resolve the disputes that have been referred to them. The section also explicitly authorizes arbitrators to issue decisions, called "awards," to resolve referred disputes.

This section is intended to provide arbitrators with the appropriate authority and flexibility to conduct arbitral proceedings in an informal and efficient manner and to keep the arbitral proceedings from becoming, in essence, full-blown litigation proceedings. An arbitrator should not use the authority granted in this section to indulge in or permit excessive discovery. Instead, the arbitrator should make appropriate use of the authority provided in this section to gather the necessary materials and information to conduct a fair, effective and expeditious inquiry.

The section also limits arbitrators to the subpoena authority granted by the Arbitration Act and to the agency sponsoring the arbitral proceeding. This language is intended to ensure that the same practices and body of law apply to all arbitrations of disputes with federal agencies, whether initiated under the ADR subchapter in Title 5 or the Arbitration Act in Title 9. It is also intended to ensure that federal agencies do not gain, as a consequence of this Act, any subpoena powers that they do not already possess.

"Section 589. Arbitration Proceedings"

A new Section 589 establishes basic rules for the conduct of arbitration proceedings, including a hearing. It authorizes the arbitrator to set the time and place for the hearing and notify the parties. It provides basic due process rights and declares that the hearing "shall be conducted expeditiously and in an informal manner." It requires the arbitrator to issue the award within 30 days of the

close of the hearing, unless the relevant agency has a different rule or the parties reach agreement otherwise.

The section allows arbitrators to exclude evidence that is "irrelevant, immaterial, unduly repetitious, or privileged." This common standard for evidence in arbitral hearings is again designed to insure proceedings which are informal and expeditious.

The section authorizes a record of the proceeding to be kept where one or more parties agree to pay for the cost. It prohibits *ex parte* communications and allows the arbitrator to impose sanctions for violations of this rule.

"Section 590. Arbitration awards"

A new Section 590 provides standards for the issuance and finalization of arbitral awards. The section requires written awards, with a brief, informal discussion of the factual and legal basis for the decision made, unless an agency rule provides otherwise.

The section provides that awards become final 30 days after they are served on all parties unless an agency extends the 30-day period by serving notice before the end of the initial 30-day period. The section authorizes the head of an agency, at any time before an award becomes final, to terminate the arbitration proceeding or vacate the issued award by serving written notice on all other parties. This provision, which was added to resolve Constitutional concerns about an arbitrator's making decisions for the federal government, clearly places ultimate decisionmaking authority will the agency head.

The section prohibits any agency employee or agent who was an investigator or prosecutor in the matter from advising the agency head on a decision to terminate proceedings or vacate an award, except in a public setting. The purpose of this provision is to prevent a situation in which, for example, the agency counsel who presented the case to the arbitrator and lost, then meets with the agency head privately and argues for reversal of the arbitrator. The Act disallows such *ex parte* sessions, because the decision to terminate arbitration or vacate an arbitral award is a grave one and should be reached without showing favoritism to the agency's own personnel. Agency personnel are allowed, under the section, to participate in exchanges in which opponents can hear and respond to the arguments used. The section also allows the agency's investigators and prosecutors to testify or argue in such related public proceedings as a hearing on a motion to recover attorney fees.

Once an award becomes final, the section provides that it is binding and enforceable against the United States pursuant to the Arbitration Act. Arbitral awards which are vacated, on the other hand, are inadmissible in any related proceeding.

The section provides that, in the event an agency vacates an award or terminates an arbitration, any party to the arbitration other than the United States, may petition for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA). This petition may be filed with a court or administrative law judge using the standards for recovery articulated in the EAJA. The section references the EAJA in order to make use of the complex body of law already developed under that statute and to ensure that per-

sons using ADR procedures have the same rights as persons who engage in litigation.

The section also provides that, if ordered by a court or administrative law judge, payment for such attorney fees and expenses must be taken from the funds of the agency that vacated the arbitration award or terminated the arbitration proceedings. The purpose of this provision is twofold: (1) to reimburse parties who engaged in the arbitration process for their out-of-pocket expenses, and (2) to provide an incentive for agencies to abide by an arbitration by making them otherwise liable for the other parties' costs.

"Section 591. Judicial review"

A new Section 591 authorizes judicial review of arbitral awards pursuant to the Arbitration Act, except that it prohibits judicial review of any agency decision, under Section 590, to terminate an arbitral proceeding or vacate an arbitral award. The section also prohibits judicial review of an agency decision to use—or not to use—ADR proceedings (other than arbitration) to resolve a particular dispute. That decision is left to the discretion of the agency.

"Section 592. Compilation of information"

A new section 592 authorizes the Administrative Conference of the United States to collect data on agency ADR proceedings and requires agencies to provide to ACUS requested data on their ADR proceedings.

"Section 593. Support services"

A new section 595 of Title 5 authorizes agencies to use the services of the agencies and private organizations and individuals for ADR proceedings, with or without compensation, and without regard to restrictions in Section 1342 of Title 31.

The final portion of Section 4 of the Act amends the table of contents in Title 5, to include the new subchapter and its sections.

Section 5. Judicial review of arbitration awards

Section 5 amends Section 10 of the Arbitration Act to provide a right of judicial review to nonparties affected by arbitration awards. A new subsection (b) provides that a person who was not party to an arbitration proceeding may obtain judicial review of the arbitral award, if that person was adversely affected and if agency use of arbitration was clearly inconsistent with the factors in Section 582 of Title 5, as established by this Act.

Section 6. Government contract claims

Section 6 amends the Contract Disputes Act of 1978 (CDA) to encourage contracting officers to resolve claims consensually through the use of ADR techniques.

The section amends the CDA by: (1) explicitly authorizing the use of ADR proceedings pursuant to the new subchapter in Title 5; (2) requiring the contractor to certify that a contract claim submitted for resolution using ADR techniques is made in good faith, with accurate supporting information and with an accurate request for a

contract adjustment; and (3) authorizing judicial review of arbitral awards on CDA contract claims pursuant to the Arbitration Act and subject to any amount limitations in the CDA or other laws. The section imposes the same five-year sunset provision on the CDA amendments as apply to the rest of the Act.

Section 7. Federal Mediation and Conciliation Service

Section 7 authorizes the Federal Mediation and Conciliation Service (FMCS) to make its services available to Federal agencies using ADR proceedings under the new subchapter in Title 5. The section authorizes FMCS to provide such services as training, furnishing neutrals, and maintaining rosters of neutrals, including arbitrators.

Section 8. Government tort claims

Section 8 amends the Federal Tort Claims Act to authorize federal agencies to use ADR techniques, pursuant to the new subchapter in Title 5, to resolve tort claims against the United States. The section authorizes agencies to settle such claims to the same extent that the Attorney General has delegated settlement authority to the agency head. However, the section also imposes a ceiling on the agencies' settlement authority, indicating that it may not exceed the settlement authority delegated by the Attorney General to the U.S. Attorneys to settle claims for money damages against the United States.

Section 9. Use of nonattorneys

Section 9 requires each agency to consider whether to allow nonattorney representation in its ADR proceedings. It also requires agencies, if nonattorneys are permitted, to develop an agency policy on the disqualification of such nonattorney representatives when warranted.

Section 10. Definitions

Section 10 defines certain terms used in this Act including: "agency," "administrative program," and "alternative means of dispute resolution." The terms have the same meaning as they do in the new Section 581 of Title 5, as provided in this Act.

Section 11. Sunset provision

Section 11 imposes a five-year sunset (until October 1, 1995) on the Act.

V. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 17, 1990.

Hon. John Glenn,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 971, the Administrative Dispute Resolution Act.

If you wish further details on this estimate, we will be pleased to provid them.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 971.

2. Bill title: The Administrative Dispute Resolution Act.

3. Bill status: As ordered reported by the Senate Committee on Governmental Affairs, October 17, 1990.

4. Bill purpose: S. 971 would authorize and encourage federal agencies to use alternative methods of dispute resolution—such as mediation, conciliation, and arbitration—instead of conventional adjudication to resolve disputes. The bill would require the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS) to assist agencies in adopting these alternative methods.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Estimated authorization level	1	1			
Estimated outlays	1	1			

The costs of this bill would be in budget function 750.

This table does not include possible budgetry savings from increased use of alternative methods of dispute resolution, which we cannot estimate. These alternative methods are generally less expensive than conventional proceedings, such as hearings before administrative law judges, because they take less time and usually result in less litigation.

Basis of estimate: Although S. 971 would not authorize the appropriation of any funds, CBO expects that the ACUS and the FMCS would require additional resources to implement the bill effectively. Based on information provided by the ACUS and the FMCS, we estimate that these agencies would incur additional costs of about $1 million annually for the two years after enactment of the bill; this amount is shown in the table above. These costs would be for securing the services of neutral facilitators, training programs, and other general support for agencies seeking to use alternative methods of dispute resolution. The estimate outlays are based on historical spending patterns and assume appropriations of the necessary amounts.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On May 24, 1990, CBO prepared an estimate for H.R. 2497, the Administrative Dispute Resolution Act, as ordered reported by the House Committee on the Judiciary, May 22, 1990. The estimated costs of S. 971 are the same as for H.R. 2497.

9. Estimate prepared by: Michael Sieverts (226-2860) and Cory Leach (226-2820).

10. Estimate approved by: C.G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

VI. Regulatory Impact

The purpose of S. 971 is to encourage federal agencies to use alternative dispute resolution (ADR) techniques. The only regulatory change required by the Act is amendment of the Federal Acquisition Regulation (FAR) to include standard language permitting use of ADR techniques, on a voluntary basis, to resolve disputes arising in connection with federal contracts, grants and other agreements. The Act also requires agencies to issue policies, but not necessarily regulations, regarding the use of ADR techniques and ADR case management. Finally, the bill requires the Administrative Conference of the United States to issue recommended professional standards for persons qualified to serve as neutrals in agency ADR proceedings. The Committee expects that some agencies will issue regulations to implement some of the provisions of the Act—for example, agency use of arbitration. Such regulations are not expected, however, to impose any burden on potential ADR participants, but rather would provide public informaton on how the agency's ADR procedures work.

VII. Changes in Existing Law

TITLE 5, UNITED STATES CODE

PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

Subchapter I—General Provisions

Sec. 500. Administrative practice: general provisions.

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Subchapter IV—Alternative Means of Dispute Resolution in the Administrative Process

581. Definitions.
582. General authority.
583. Neutrals.
584. Confidentiality.
585. Authorization of arbitration.
586. Enforcement of arbitration agreements.
587. Arbitrators.
588. Authority of the arbitrator.
589. Arbitration proceedings.
590. Arbitration awards.
591. Judicial review.
592. Authorization to use services of employees of other agencies.
593. Qualifications and roster of neutrals: procurement.
594. Compilation of information.
595. Support services.

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Subchapter II—Administrative Procedure

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§ 556. Hearings: presiding employees: powers and duties; burden of proof; evidence; record as basis of decision

(a) * * *

* * * * * * *

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) * * *

* * * * * * *

(6) hold conferences for the settlement or simplification of the issues by consent of the parties *or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;*

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

[(7)**]** *(9)* dispose of procedural requests or similar matters;

[(8)**]** *(10)* make or recommend decisions in accordance with section 557 of this title; and

[(9)**]** *(11)* take other action authorized by agency rule consistent with this subchapter.

* * * * * * *

Subchapter IV—Alternative Means of Dispute Resolution in the Administrative Process

§ 581. Definitions

For the purposes of this subchapter, the term—

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licsening, or investigation, as those terms are used in subchapter II of this chapter;

(3) "alternative means of dispute resolution" means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

(4) "award" means any decision by an arbitrator resolving the issues in controversy;

(5) "dispute resolution communication" means any oral or written communication made in confidence in connection with

a dispute resolution proceeding by any party, neutral, or non-party participant;

(6) "dispute resolution document" means any written material that is—

(A) prepared for the purpsoe of, in the course of, or pursuant to a dispute resolution proceeding, including any memoranda, notes, or work product of the neutral or the parties; or

(B) provided in confidence to the neutral or other parties in a dispute resolution proceeding for purposes of that dispute resolution proceeding;

except that an agreement or arbitral award reached as a result of a dispute resolution proceeding is not a dispute resolution document unless the parties so agree in writing and the law otherwise allows that it shall be regarded as such a document;

(7) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(8) "in confidence" means, with respect to information, that the information is provided—

(A) with the expressed intent of the source that it not be disclosed; or

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(9) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement between the agency and persons who would be substantially affected by the decision;

(10) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(11) "party" means—

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(12) "person" has the same meaning as in section 551(2) of this title; and

(13) "roster" means a list of persons qualified to provide services as neutrals.

§ 582. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if—

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§ 583. Neutrals

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall—

(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;

(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and

(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individuals for services as

a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

§ 584. Confidentiality.

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily or through discovery or compulsory process be required to disclose any information concerning any dispute resolution document or any dispute resolution communication, unless—

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication or dispute resolution document was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution document has already been made public;

(3) the dispute resolution communication or dispute resolution document is required by statute to be made public, but a neutral should make such communication or document public only if no other person is reasonably available to provide the document or disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety,

of sufficent magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) Except as provided in subsection (d), a party to a dispute resolution proceeding shall not voluntarily or through discovery or compulsory process be required to disclose any information concerning any dispute resolution document or any dispute resolution communication, unless—

(1) all parties to the dispute resolution proceeding consent in writing;

(2) the dispute resolution document has already been made public;

(3) the dispute resolution communication or dispute resolution document is required by statute to be made public;

(4) such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

(5) the dispute resolution document or dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolu-

tion proceeding or to the enforcement of such an agreement or award.

(c) Any dispute resolution communication or dispute resolution document that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication or document was made.

(d) The parties may agree to alternative confidential procedures. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution document or communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) an (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research of educational purposes, in connection with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution document to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution document is disclosed only to the extent necessary to resolve such dispute.

§ 585. Authorization of arbitration

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to—

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency may offer to use arbitration for the resolution of issues in controversy, if such officer or employee—

(1) has authority to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

§ 586. Enforcement of arbitration agreements

An agreement to arbitrate a matter to which this subchapter applies is enforceable pursuant to section 4 of title 9, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

§ 587. Arbitrators

(a) The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.

(b) The arbitrator shall be a neutral who meets the criteria of section 583 of this title.

§ 588. Authority of the arbitrator

An arbitrator to whom a dispute is referred under this subchapter may—

(1) regulate the course of and conduct arbitral hearings:

(2) administer oaths and affirmations;

(3) complete the attendance of witnesses and production of evidence at the hearing under the provisions of section 7 of title 9 only to the extent the agency involved is otherwise authorized by law to do so; and

(4) make awards.

§ 589. Arbitration proceedings

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than 5 days before the hearing.

(b) Any party wishing a record of the hearing shall—

(1) be responsible for the preparation of such record;

(2) notify the other parties and the arbitrator of the preparation of such record;

(3) furnish copies to all identified parties and the arbitrator; and

(4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless—

(1) the parties agree to some other time limit; or

(2) the agency provides by rule for some other time limit.

§ 590. Arbitration awards

(a)(1) Unless the agency provides otherwise by rule, the award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) The prevailing parties shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of any request by a party, nonparty participant or other person that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, advise in a decision under this subsection to terminate an arbitration proceeding or to vacate an arbitral award, except as witness or counsel in public proceedings.

(d) A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(e) An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

(f) An arbitral award that is vacated under subsection (c) shall not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.

(g) If an agency vacates an award under subsection (c), a party to the arbitration other than the United States may petition for an award of attorney fees and expenses pursuant to the Equal Access to Justice Act. Such fees and expenses shall be paid from the funds of the agency that vacated the award.

§ 591. Judicial Review

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

(b)(1) A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

(2) A decision by the head of an agency under section 590 to terminate an arbitration proceeding or vacate an arbitral award shall be committed to the discretion of the agency and shall not be subject to judicial review.

§ 592. Compilation of information

"The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.

§ 593. Support services

For the purposes of this subchapter, an agency may use (with or without reimbursement) the services and facilities of other Federal agencies, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.

SECTION 10 OF TITLE 9, UNITED STATES CODE

* * * * * * *

§ 10. Same: vacation; grounds; rehearing

[In either] *(a) In any* of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

[(a)] *(1)* Where the award was procured by corruption, fraud, or undue means.

[(b)] *(2)* Where there was evident partiality or corruption in the arbitrators, or either of them.

[(c)] *(3)* Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

[(d)] *(4)* Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(e)] *(5)* Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

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THE CONTRACT DISPUTES ACT OF 1978

* * * * * * *

DECISION BY THE CONTRACTING OFFICER

SEC. 6. * * *
(a) * * *

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(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.

(e) The authority of agencies to use dispute resolution proceedings under section (d) shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate.

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AGENCY BOARDS OF CONTRACT APPEALS

SEC. 8. * * *
(a) * * *

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(g)(1) * * *

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(3) An award by an arbitrator under this Act shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

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SECTION 203 OF THE LABOR MANAGEMENT RELATIONS ACT, 1947

FUNCTIONS OF THE SERVICE

SEC. 203. (a) * * *

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(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes relating to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 583 of title 5, United States Code, may be assigned to act as neutrals. The Service may consult and cooperate with the Administrative Conference of the United States and other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection.

SECTION 2672 OF TITLE 28, UNITED STATES CODE

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while

acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. *Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.*

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

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